84-1788

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO,

Petitioner,

v.

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

This Court has held that a labor arbitration award is legitimate only so long as it "draws its essence" from the parties' collective bargaining agreement. The question presented is whether an arbitration award that construed contractual language to mean its very opposite—i.e., that permitted employers to implement *decreases* in employee wages when the agreement provided only for wage *increases*—must be vacated under that standard of review.*

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* Respondent National Elevator Industry, Inc. is a trade association made up of the following companies: Armour Elevator Co., Inc. (Kone Corporation, parent company); Bay State Elevator Co., Inc.; Beckwith Elevator Co., Inc.; Canton Elevator & Manufacturing, Inc.; Carter Elevator Co., Inc.; Dover Elevator Company (Dover Elevator International, parent company); Eastern Elevator Co., Inc.; Elevators, Inc. (Elevator Enterprises Inc., parent company); ESCO Elevators, Inc.; Fujitec America, Inc., (Fujitec Co., Ltd., parent company); Gallagher Elevator Co., Inc.; General Elevator Company, Inc.; Grindel Elevator Co., Inc.; Hardwick Elevator Co., Inc.; Hollister Whitney Elevator Corp.; Independent Elevator Company; Gust. Lagerquist & Sons, Inc.; Lamps Elevator Sales and Service, Inc.; Marshall Elevator Co.; D.A. Matot, Inc.; Geo. T. McLauthlin Co. d/b/a McLauthlin Elevator Co.; McNally Elevator Company, Inc.; Midstate Elevator Co., Inc.; Montgomery Elevator Company; National Elevator Corporation; O'Keefe Elevator Company, Inc.; Otis Elevator Company (United Technology Corporation, parent company); F.S. Payne Co.; Powers Elevator Company; Rossborough Elevators, Inc.; Schindler Haughton Elevator Corporation (Schindler Holding, parent company); Schumacker Elevator Co., Inc.; Sedgwick Lifts, Inc. (The Peele Co., parent company); Seelar & Co. Elevators; Serge Elevator Co., Inc.; Suburban Elevator Company, Inc. and; Westinghouse Elevator Company (Westinghouse Electric Corporation, parent company).

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INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO,

Petitioner,

v.

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The International Union of Elevator Constructors, AFL-CIO, petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered February 19, 1985.

OPINIONS BELOW

The Court of Appeals did not issue a formal opinion but issued an unreported order. The District Court's opinion is reported at 590 F. Supp. 1218 (S.D.N.Y. 1984). The order of the Court of Appeals is reproduced *infra* in the Appendix at p. 1a. The District Court's opinion appears *infra* in the Appendix at p. 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 1985. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves Sections 203(d) and 301(a) of the Labor Management Relations Act, 29 U.S.C. § 173(d) and § 185(a). Section 203(d) provides in relevant part as follows:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Section 185(a) provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

Petitioner International Union of Elevator Constructors, AFL-CIO is a labor organization representing in excess of 20,000 "elevator constructor" employees nationwide in the elevator and escalator construction, service and maintenance, repair and modernization industries. Respondent National Elevator Industry, Inc., "NEII", is the employer bargaining representative for many of the companies in the elevator and escalator industries. The Union and NEII have a longstanding bargaining relationship going back to the 1920's, and since that time they have entered into a series of five-year, nationwide collective bargaining agreements, each known as the "Standard Agreement".

One provision of the Standard Agreement, Article V, sets forth a formula for determining wage rates of ele-

vator constructors in the Union's various affiliated locals located throughout the country. Until 1967, Article V set wages for elevator constructors according to what was referred to as the "Atlantic City Plan," adopted by the parties back in 1921. As originally formulated, the Atlantic City Plan provided that the wage rate for elevator constructor mechanics in a particular local union's area would be determined simply by averaging the five highest wage rates of seven specified other building trades in the the area.[1] To take an example, if at a particular time when a wage rate change was due to be made in Chicago, the five highest of the specified "Atlantic City trades" in Chicago were the plumbers, the ironworkers, the bricklayers, the plasterers and the electricians, the wage rate of an elevator constructor in Chicago would be determined by taking these other trades' wage rates and averaging them.[2]

In the negotiations preceding adoption of the 1967-1972 Standard Agreement, the Union proposed that the Atlantic City Plan be substantially modified. Following weeks of negotiations and a lengthy strike, the employers agreed to abandon the original Plan's method of determin-

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[1] This averaging formula, as set forth in Article V, Par. 1A of the 1962-66 Standard Agreement provided as follows:

> 1A. At a meeting held in Atlantic City, July 11-16, 1921, between the representatives of the Elevator Manufacturers and members of the Executive Board of the International Union of Elevator Constructors, it was agreed that the average wage rate of the five highest of the following seven principal building trades, namely (1) bricklayers, (2) plasterers, (3) carpenters, (4) electricians, (5) sheetmetal workers, (6) plumbers and steamfitters, and (7) ironworkers, be accepted as the wage rate for the Elevator Constructor Helpers to be seventy (70) percent of the Elevator Constructor Mechanics' rate.

[2] Because the Standard Agreement had a term of five years, provision was made for change in the wage rate periodically during the five-year period. Under recent Standard Agreements, wage rates could be changed no more frequently than once every eleven months.

ing elevator constructor wages simply by averaging the other trades' wage rates. In its place, Article V of the new 1967-1972 Standard Agreement established a more complex formula, under which changes in the elevator constructor wages were determined by taking as a base rate the elevator constructor's own last wage rate and *adding* to it the "average gross *increase*" in both wages and fringe benefits obtained by the four highest of the original seven Atlantic City rates.[3]

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[3] Article V of the 1967-1972 Standard Agreement provided as follows (J.A. 297a):

Second And All Succeeding Wage Rate Changes After January 1, 1967

Step 1. Prepare a list of the wage rate of the four (4) trades that were used in determining the last wage rate change of the local union. Then add the wage rates. This total shall be the combined amount of the wage rates of the trades used in determining the last wage rate change in the local union.

Step 2. List the seven (7) Atlantic City trades and set forth separately the wage rate of each trade and all the increases in fringe benefits each trade obtained since thirty (30) days previous to the effective date of the local union's last wage rate change. The seven (7) Atlantic City trades are the following principal building trades, namely (1) bricklayers, (2) plasterers, (3) carpenters, (4) electricians, (5) sheet metal workers, (6) plumbers and steamfitters, and (7) ironworkers.

Step 3. Select from the list compiled in Step 2 the four (4) trades with the highest wage rates.

Step 4. Add the wage rates of the four (4) highest trades. Also add all the increases in fringe benefits of these same four (4) trades. Then add together these totals and that amount shall be the combined wage rates and combined fringe increase of the four (4) highest trades.

Step 5. Subtract from the total computed in Step 4 the total computed in Step 1. The remaining amount shall be the gross increase.

[Footnote continued]

Under the original "pure averaging" Atlantic City formula, it was at least theoretically possible for an elevator constructor to suffer a wage *decrease* if the other trades took decreases. However, a wage decrease could not occur under the revised formula because it took as its starting point the elevator constructor's *existing* wage and then *added* to it the average *increase* of the other trades. Only the word "increase" appeared in the revised Article V; the word "decrease" was totally absent. The formula did not provide for "subtracting" from the existing elevator constructor rate whatever average "decreases" may have been suffered by the other trades. If the other trades actually suffered a wage decrease, there simply would be no increase to add to the existing Elevator Constructor wage rate, and that rate would remain the same.[4]

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[3] [Continued]

Step 6. Divide the gross increase as computed in Step 5 by four (4). The remaining amount shall be the average gross increase.

Step 7. Subtract from the average gross increase as computed in Step 6 the credits agreed upon in Par. 1D.

Step 8. After making the above subtraction, the remaining amount shall be added to the existing wage rate of the Elevator Constructor Mechanics. The result shall be the wage rate for the Elevator Constructor Mechanics.

[4] The one subtraction, or decrease, that is allowed under the formula as revised in 1967 and again in 1972 is a credit for the amount by which the employers had already agreed to increase fringe benefit contributions under a different provision of the Standard Agreement. In effect, the employers said to the Union, "You shouldn't be allowed to get the benefit of the increases in the fringes the other trades received in your wage rate and also be allowed to take the increase in fringes that we, the elevator constructor employers, were also agreeing to make elsewhere in the agreement." Thus, while it is possible for elevator constructors to take a decrease, the decrease is limited by operation of the formula itself to the amount of the fringe credits. If the operation of this averaging of the rates and the fringes of the other trades does not produce an increase sufficient to cover these fringe credits, then an elevator constructor could suffer a decrease, but *only to the extent of those fringe credits.*

What gave rise to the dispute at issue was NEII's action on August 1, 1983, in proposing that the wage rate for Local 129, Cedar Rapids, Iowa, be changed by reducing the wage rate of Local 129 mechanics by $2.54 per hour. The Union would not agree, arguing that such reductions were impermissible under Article V. The reduction represented what was, in effect, the average gross *decrease* suffered by the other trades in the area.[5] This decrease was *subtracted* by NEII from the existing rate. There is no provision in Article V for "subtracting" the "decrease" from the elevator constructor's rate.

When the Union first learned of the companies' intention to implement the wage decrease over its objection, the Union filed a complaint in the U.S. District Court for the Southern District of New York, seeking to enjoin the decrease pending a decision on the merits in arbitration under the Standard Agreement's grievance and arbitration procedures. The Union's request for an injunction was denied in an oral ruling from the bench, for the stated reason that there was no irreparable harm, since an arbitrator would be empowered to make employees whole for any improper decrease. The dispute then proceeded to impartial arbitration under the agreement.[6]

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[5] Thirty-one cents of this $2.54 decrease was a permissible decrease for the fringe credits and was not contested by the Union. *See* footnote 4, *supra*.

[6] Article XV of the Standard Agreement contains the following language permitting arbitration of unresolved disputes:

> Step 3. If the matter cannot be resolved in Step 2 it may be referred to an impartial arbitrator by either the IUEC, the non-association member Employer or NEII within seven (7) work days of the National Arbitration Committee meeting by notifying the American Arbitration Association that the matter is to be arbitrated. The arbitration, selection of arbitrator and all other matters shall be governed by the rules of the AAA. Notification shall be made to the regional office of the AAA nearest the place where the grievance arose or referred to that office by the office receiving the request.
>
> The arbitrator shall render his decision immediately upon the close of the record if the parties mutually agree or within

Arbitrator Stephen Goldberg issued his opinion and award on April 23, 1984. He denied the union's grievance. He conceded that the Union's main argument that the case should be resolved simply by reference to the clear, unambiguous language was "not without strength", and that if the case were decided solely on that language, the Union "might well prevail." See App. 27a, 34a, *infra.* Nevertheless, he concluded from his interpretation of the history of the parties' negotiations that even with the replacement of the original simple averaging of Article V by the "increase" language in the 1976 Standard Agreement, the wage formula was still one that could yield a decrease.

Shortly after Goldberg's award was issued, NEII moved in the District Court for an order confirming the award. In response, the Union moved to amend its original complaint to request that the award be vacated. On August 29, 1984 U.S. District Judge Gerard Goettel issued an opinion confirming the arbitrator's award and denying the Union's cross-motion requesting that the award be vacated. App. 3a, *infra.* The District Court's judgment confirming the award was filed September 12, 1984. The Union appealed the District Court's decision. On February, 19, 1985, after oral argument, the Court of Appeals issued a decision affirming the District Court's decision "substantially for the reasons stated in the opinion of Judge Goettel . . . ." App. 1a, *infra.*

Since the arbitration, the release of Arbitrator Goldberg's award and the lower court proceedings, NEII has implemented wage decreases in several other local union jurisdictions. Thus, the impact of Goldberg's award construing the industry's national collective bargaining is

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30 days of the receipt of the transcript or briefs if the parties desire to file briefs. The parties are encouraged to expedite the arbitration process. In an arbitration, either party may rely upon Articles in the Standard Agreement other than those set forth in the original grievance form. The decision of the impartial arbitrator shall be final and binding on all parties.

now being felt by thousands of workers throughout the United States.

REASONS FOR GRANTING THE WRIT

1. The Decisions of the District Court and the Court of Appeals are Contrary to the Decisions of this Court.

It is now beyond question that the federal courts generally should avoid review of the merits of labor arbitration awards. That was the holding of this Court in *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

The reluctance of the federal courts to re-try the merits of arbitration cases is based upon the federal labor policy of encouraging the settling of industrial disputes through arbitration. That policy would be undermined, this Court recognized, if courts had the final say in such disputes. *Id.*

However, while denying to the courts the opportunity to second-guess arbitrators on the merits, this Court has made clear that arbitration awards are not completely shielded from judicial scrutiny. Review is appropriate, *Enterprise* emphasized, to determine whether the arbitrator's award finds support in the collective bargaining agreement the arbitrator was called upon to interpret and apply. If not, the courts must refuse to enforce the award:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, *yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.* When the arbitrator's words manifest an infidelity to this obligation, *courts have no choice but to refuse enforcement of the award.* 363 U.S. at 597 (emphasis added).

As other decisions have since recognized, there is no inconsistency between the policy identified in *Enterprise* of encouraging arbitration and denial of enforcement of

an award that does not "draw its essence" from the disputing parties' agreement. Refusal to enforce such awards actually would stimulate, rather than inhibit, resort to arbitration by "guaranteeing to the parties to the collective bargaining agreement that they will find in the arbitrator not a 'philosopher king' but one who will resolve their disputes within the framework of the agreement which they negotiated." *Torrington Co. v. Metal Product Workers*, 362 F.2d 677, 682 (2d Cir. 1966).

If this Court's "essence" test for reviewing arbitration awards announced in *Enterprise* continues to be anything more than an empty formula, and if that decision leaves anything to the courts beyond mere rubber-stamping of arbitration awards, then surely an award that makes the words of a contract mean their *exact opposites* cannot pass muster. Yet the arbitrator indulged in just such an Orwellian use of language when he held that a wage *decrease* was permissible under a contract providing only for an *increase*. The arbitrator acknowledged that his award was at odds with the language of the agreement [7] but sought to justify his decision on the basis of the parties' bargaining history, which itself was in dispute.[8] While it is ordinarily proper for an arbitrator to consider bargaining history in construing ambiguous contract language, the *Enterprise* doctrine would be nullified if clear contract language could be overridden by

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[7] "To be sure", he wrote, "Article V on its face refers only to wage increases." If the case turned solely on that language, he conceded, the union "might well prevail." App. 27a, 34a.

[8] A critical exhibit at the arbitration hearing was an April 11, 1967 letter captioned "Intent in Wage Computations" sent to the union by the employers' chief negotiator which stated that during the term of the agreement negotiated in 1967, base wage rates "will not be reduced as a result of the wage computations under the formula set forth in Article V." The arbitrator concluded that the employers' contention that this letter should not be read so as to bar decreases was "plausible". *See* App. at 31a-32a, *infra*.

bargaining history which is itself far more uncertain in import.

In their refusal to vacate an arbitrator's award that so flatly contradicts the plain language of the agreement, the decisions of the District Court and the Court of Appeals are in conflict with this Court's holding in *Enterprise*. Moreover, by sanctioning such an award, those decisions tend to undermine confidence in the arbitration process, thereby contravening the very policy on which the limited standard of review of awards is based—encouraging resort to arbitration. Accordingly, review by this Court is warranted.

2. The Decisions of the District Court and the Court of Appeals are Contrary to the Decisions of Several Courts of Appeals.

Since *Enterprise*, numerous courts of appeals have relied on that decision in refusing to enforce arbitration awards when the awards have contravened or disregarded clear contractual language. *See, e.g., Pacific Motor Trucking Co. v. Automotive Machinists Union*, 702 F.2d 176 (9th Cir. 1983) (award that "conflicts directly with the contract" properly vacated); *Clinchfield Coal Co. v. District 28, United Mine Workers*, 720 F.2d 1365 (4th Cir. 1983) (award's failure to consider "critical contract terminology" indicated failure to "draw its essence" from the agreement); *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 394 (7th Cir. 1981) (award vacated that demonstrated "infidelity to the plain restrictive terms of the contract"); *Detroit Coil Co. v. IAM Lodge 82*, 594 F.2d 575, 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 840 (1979) (an arbitrator "is without authority to disregard or modify plain and unambiguous provisions"); *Timken Company v. Local 1123, United Steelworkers of America*, 482 F.2d 1012 (6th Cir. 1973) (disregard of clear contract language manifested "clear infidelity" to arbitrator's obligation under *Enterprise*);

H.K. Porter Co., Inc. v. United Saw Workers, 333 F.2d 596 (3d Cir. 1964) (clear language left the arbitrator "no room to construe in any manner than according to its plain meaning") and *Textile Workers Union, Local 1386 v. American Thread Co.*, 291 F.2d 894, 899 (4th Cir. 1961) ("We are not persuaded that the Supreme Court . . . intended that the courts should permit an arbitrator to render decisions which do violence to the clear, plain, exact and unambiguous terms of the . . . contract of the contending parties.")

The arbitrator's award in this case, which turned the language of the contract *completely on its head*, represents a far more egregious derogation of the collective bargaining agreement and its language than in any of these court of appeals' decisions, where enforcement was denied because of mere "disregard", "infidelity" or "failure to consider" contract language. In confirming the arbitrator's award, the decisions below are irreconcilable with these decisions and, thus, review by this Court is warranted.

CONCLUSION

For the foregoing reason this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of February, one thousand nine hundred and eighty-five.

Present: HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE WILLIAM H. TIMBERS,

HONORABLE RICHARD J. CARDAMONE,
Circuit Judges.

84-7830

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO,
Plaintiff-Appellant,

—against—

NATIONAL ELEVATOR INDUSTRY, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York

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[Filed Feb. 19, 1985]

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED substantially for the reasons stated in the opinion of Judge Goettel dated August 29, 1984.

/s/ Wilfred Feinberg
WILFRED FEINBERG
Chief Judge

/s/ William H. Timbers
WILLIAM H. TIMBERS

/s/ Richard J. Cardamone
RICHARD J. CARDAMONE
Circuit Judges

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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83 Civ. 6064 (GLG)

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO,

Plaintiff,

—against—

NATIONAL ELEVATOR INDUSTRY, INC.,

Defendant.

OPINION

APPEARANCES:

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GOETTEL, D. J.:

Before the Court is the defendant's motion to confirm the findings of an arbitrator in a labor dispute and the plaintiff's motion to vacate the arbitrator's findings.[1] For the following reasons, the Court grants the defendant's motion to confirm and denies the plaintiff's motion to vacate.

BACKGROUND

The dispute in this case invloves the amount of wages paid to workers who install and maintain elevators. The wages are governed by a collective bargaining agreement between the plaintiff, International Union of Elevator Constructors ("IUEC"), of which the workers are members, and the defendant, National Elevator Industry, Inc. ("NEI"), an organization of employers in the elevator industry.

The current contract became effective on July 9, 1982, and expires on July 8, 1987. This contract uses a formula, developed in Atlantic City, New Jersey, (the Atlantic City Plan"), under which wages for employees in the elevator industry are set by averaging the wages of other workers in the principal construction trades.[2]

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[1] Also before the Court are the defendant's motion for summary judgment, the plaintiff's cross-motion for summary judgment, and the plaintiff's motion to amend its complaint. There is no need to rule on these motions since the Court confirms the arbitrator's findings.

[2] The formula is set out in Article V of the Standard Agreement between the IUEC and the NEI. Although the formula has undergone some changes over the years, its essential operation is simple: Each local union of the IUEC collects wage and fringe benefit data from the unions of the seven principal construction unions (bricklayers, plasterers, carpenters, electricians, sheet metal workers, plumbers, and steamfitters). The four highest wages are then added together and averaged to arrive at the wages to be paid to IUEC members.

In the past, the wages of other construction workers have risen steadily, and, as a result, the wages of the IUEC workers have gone up as well. Then, there was trouble in Cedar Rapids, Iowa, home of the IUEC's Local 129. Apparently fearing that high union wage rates would lead more employers in the construction business to employ non-union labor, all of the unions upon whose contracts the Atlantic City Plan is based agreed to accept pay cuts in an attempt to prevent non-union workers from taking jobs then held by union members.[3] The effect of these cuts was that, based on the Atlantic City Plan, the IUEC members were earning $2.54 per hour more than the formula would allow. Following the wage-reducing agreements between the other construction unions and their employers, the NEI unilaterally reduced the wages of IUEC members, in accordance with the Atlantic City Plan.

The IUEC sought a preliminary injunction to bar these decreases, which was denied. The IUEC then instituted this action, seeking a permanent injunction barring the NEI and its member employers from reducing the wages of their employees in Cedar Rapids or in any other location, and for monetary damages suffered as a result of the pay reductions. After the action was filed, the case was moved to the suspense docket pending the outcome of arbitration proceedings before Arbitrator Stephen B. Goldberg ("Goldberg"). The arbitrator has now issued his report, finding that, under the terms of the current agreement between the IUEC and the NEI, the Atlantic City Plan allows the wages of elevator workers to be adjusted downward when the wages of the construction workers to which they are pegged are reduced.

The NEI now moves to confirm those findings and the IUEC moves to vacate them.

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[3] Apparently, there is little threat in the elevator industry of non-union labor being used, and so the IUEC is not at all interested in taking a pay cut.

DISCUSSION

The IUEC is disturbed by the findings of arbitrator Goldberg, not only because of their impact on the Cedar Rapids workers, but also because of the implications for its members in other locals across the country. The IUEC, in seeking to have the arbitrator's holdings set aside, argues that the wage formula is an "up" escalator only. The NEI argues that, like the elevators they install, the wages of the employees, because they are pegged to the wages of other construction workers, must be allowed to come down as well as go up.

A. *The Legal Standard the Court Must Apply in Reviewing the Arbitrator's Findings*

While the parties disagree as to the propriety of the arbitrator's holdings, they agree on two things: first, that arbitration is critical to the smooth functioning of labor-management relations; and second, that an arbitrator's findings should not be casually set aside by the courts unless the arbitrator has exceeded the scope of the collective bargaining agreement from which he draws his authority.

In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), Justice Douglas explained that courts should not make haste to re-examine the merits of an arbitration award because "[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Id.* at 596. However, Justice Douglas added, this did not mean that courts could never review the merits of an arbitration award.

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet *his award is legitimate only so*

> *long as it draws its essence from the collective bargaining agreement.* When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. at 597 (emphasis added). *See Wire Service Guild, Local 222 v. United Press International, Inc.*, 623 F.2d 257 (2d Cir. 1980); *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691 (2d Cir. 1978); *Local 771, I.A.T.S.E. v. R.K.O. General, Inc.*, 546 F.2d 1107 (2d Cir. 1977); *Torrington Co. v. Metal Products Workers Union, Local 1465*, 362 F.2d 677 (2d Cir. 1966).

In reviewing the arbitrator's decision, "the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra*, 363 U.S. at 599. "When arbitrators explain their conclusions . . . in terms that offer even a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented by litigants who merely argue, however persuasively, for a different result." *Andros Compania Maritima, S.A. v. Marc Rich & Co., supra*, 579 F.2d at 704.

Thus, in considering the motions to confirm or to vacate the findings of the arbitrator, the Court may only decide whether the findings draw their essence from the agreement under which the arbitrator based his authority.

B. *The Arbitrator's Findings Were Faithful to the Essence of the Collective Bargaining Agreement*

After reviewing a 196-page transcript and voluminous exhibits, Goldberg handed down a careful, well-reasoned, 33-page decision in which he concluded that the terms of the collective bargaining agreement between the IUEC and the NEI allowed the employers to reduce the wages of elevator workers when the wages of other construc-

tion workers went down. Because this decision "draws its essence from the collective bargaining agreement," the Court, as explained above, cannot set it aside. *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra,* 363 U.S. at 597.

There is no need to analyze the decision of the arbitrator in detail, but the Court nevertheless briefly notes the following. Although the collective bargaining agreement speaks in terms of wage increases, Goldberg quite properly looked to the history of the agreement and found that the use of the word "increase" was not in any way intended to bar decreases. He appropriately found that there apparently had never been any wage decreases in the construction industry in the past and so the subject of decreases had not been contemplated by either side during the negotiations that led to the signing of the contract. Based on the evidence before him, it cannot be said that Goldberg was incorrect in rejecting the IUEC's claim that some of the changes in the wording of the collective bargaining agreement were intended to eliminate the possibility of wage decreases.

The intent of the parties who developed and agreed to the Atlantic City Plan was to insure that IUEC members would earn wages that were somewhat better than average. By allowing the wages of IUEC members to fall when the wages of the workers to which they were tied also went down, Goldberg interpreted the collective bargaining agreement in a manner consistent with the language, intent, and history of the contract. Because the elevator workers tied their fates to the fates of their fellow construction workers, they must share the ups and downs of the construction industry as a whole.

CONCLUSION

For the reasons outlined above, the findings of Arbitrator Stephen B. Goldberg are confirmed and the mo-

tion of the IUEC to vacate those findings are denied. The defendant will enter judgment accordingly.

SO ORDERED.

Dated: New York, N.Y.
August 29, 1984

/s/ Gerard L. Goettel
GERARD L. GOETTEL
U.S.D.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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83 CIV 6064

Goettel, J.

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO,

Plaintiff,

vs.

NATIONAL ELEVATOR INDUSTRY, INC.,

Defendant.

JUDGMENT

This cause came on to be heard on the motion of the defendant for an order confirming the arbitration award issued by arbitrator Stephen B. Goldberg on April 13, 1984, and for summary judgment in this action based upon said arbitration award and on the cross motion of the plaintiff for an order vacating said arbitration award and for summary judgment in this action on the grounds that there is no genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law, and the Court having considered the pleadings, affidavits, exhibits and Rule 3(g) statements heretofore filed by the parties and the oral argument of the parties at the hearing held before the Court on June 8, 1984, and the Court having filed its opinion in this action on August 29, 1984,

NOW THEREFORE, it is ORDERED, ADJUDGED and DECREED that

1. Plaintiff's motion to vacate said arbitration award be and hereby is DENIED.

2. Plaintiff's motion for summary judgment in this action be and hereby is DENIED.

3. Defendant's motion to confirm said arbitration award be and hereby is GRANTED.

4. Because said arbitration award has been confirmed, the plaintiff's complaint be and hereby is DISMISSED.

Dated: New York, N.Y.

/s/ Gerard L. Goettel
U.S.D.J.

AAA Case No. 51-30-0619-83R

In re: INTERNATIONAL UNION OF
ELEVATOR CONSTRUCTORS, AFL-CIO

—and—

NATIONAL ELEVATOR INDUSTRY, INC.

Appearances

Employers: Charles O. Strahley, Attorney,
Michael T. McGrath, Attorney (on the brief) (Putney, Twombley, Hall & Hirson)

Union: Robert Matisoff, Attorney
(O'Donoghue & O'Donoghue)

Arbitrator: Stephen B. Goldberg

I. *Introduction*

In August, 1983, Frank Aquilino, Executive Director of National Elevator Industry, Inc. (hereafter "NEII" or "the Employers") notified Everett Treadway, General President of the International Union of Elevator Constructors (hereafter "IUEC" or "the "Union") that NEII desired to make a wage rate decrease of $2.54 per hour for Local 129, Cedar Rapids, Iowa. The basis on which NEII sought to make this decrease was Article V of the 1982-87 Standard Agreement. The Union objected to the proposed decrease and a meeting was held between the parties on August 10, 1983. When no agreement was reached at that meeting, the Union sought an injunction in the U.S. District Court for the Southern District of New York barring the decrease. The injunction was denied on the ground that if an arbitrator were to find that the decrease was not authorized by the

Agreement, he or she could provide full relief to the Union through a back pay award. The Employers in the Cedar Rapids area implemented the proposed wage decrease on August 31, 1983, and these proceedings followed.

II. *Relevant Contractual Provisions*
1962-66 Standard Agreement

ARTICLE V

Wages

Par. 1. The rate of wages to be paid to Elevator Constructor Mechanics and Elevator Constructor Helpers by the Manufacturers shall be based on terms of the International Agreement covering the Elevator Industry throughout the United States and shall continue during the term of this Agreement, as follows:

1A. At a meeting held in Atlantic City, July 11-16, 1921, between the representatives of the Elevator Manufacturers and members of the Executive Board of the International Union of Elevator Constructors, it was agreed that the average wage rate of the five highest of the following seven principal building trades, namely (1) bricklayers, (2) plasterers, (3) carpenters, (4) electricians, (5) sheetmetal workers, (6) plumbers and steamfitters and (7) ironworkers, be accepted as the wage rate for the Elevator Constructor Mechanics; the wage rate for Elevator Constructor Helpers to be seventy (70 per cent of the Elevator Constructor Mechanics' rate.

* * * *

1B. It is agreed that only the hourly wage rates of the trades named in the Atlantic City Plan are to be used in determining the wage rates for the Elestructor Helpers covered by this Agreement. This means no fringe payments such as welfare plans,

tools or clothing allowances, vacations, etc. are to be used.

* * * *

Par. 3. Agreement upon the wage rate may continue as long as satisfactory to both parties, but no change in wage rate shall be made more often than eleven (11) months. Thirty (30) days' notice in writing shall be given by either party of a desire to make such change and such written notice shall constitute cause for a meeting of both parties. Change in wage rates shall not be effective in less than thirty (30) days after effective date of last wage rate change used in determining Elevator Constructor Mechanic's and Elevator Constructor Helper's wage rates.

Par. 4. In the event that any one of the seven trades enumerated in Article V, Paragraph (1A) of this Agreement, has no established International Union in that locality, then the wage rate of that trade shall be established by an International Representative of the Union and a National Representative of the manufacturers.

* * * *

Par. 6. It is understood that the wage rates used in arriving at the Elevator Constructors rates are to be taken from the building craft rates in the home town of the Local.

1967-72 Standard Agreement

ARTICLE V

Wages

Par. 1. The rate of wages to be paid to Elevator Constructor Mechanics and Elevator Constructor Helpers by the manufacturers shall be based on terms of the International Agreement covering the elevator industry throughout the United States and shall continue during the term of this agreement as follows:

1A. At meetings held in the Washington, D.C. office of the Federal Mediation and Conciliation Service during March 1967, the representatives of N.E.M.I. and the International Union of Elevator Constructors agreed to amend and modify the 1921 Atlantic City Plan for establishing the rate of wages of Elevator Constructor Mechanics and Helpers to provide that, beginning January 1, 1967, the rate of wages of all Elevator Constructor Mechanics and Helpers would be determined in accordance with the following wage plan:

First Wage Rate Change After
January 1, 1967

Step 1. List the seven (7) Atlantic City trades and set forth separately the wage rate of each trade and all the increases in fringe benefits each trade obtained since thirty (30) days previous to the effective date of the local union's last wage rate change. The seven Atlantic City Plan trades are the following principal building trades, namely: (1) bricklayers, (2) plasterers, (3) carpenters, (4) electricians, (5) sheet metal workers, (6) plumbers and steamfitters, and (7) ironworkers.

Step. 2. Select from the above list the four (4) trades with the highest wage rate.

Step. 3. Add the wage rates of the four (4) highest trades. Also add all the increases in fringe benefits of those same four (4) trades. Then add together these totals and that amount shall be the combined wage rates and combined fringe increases of the four (4) highest trades.

Step 4. Divide by four (4) the total of the combined wage rates and combined fringe increases of the four (4) trades as computed in Step 3.

Step 5. After making the division in Step 4, subtract from the remaining total the credits agreed upon in Par. 1D. After making the subtraction, the remaining amount shall be the wage rate for the Elevator Constructor Mechanics.

Second and All Succeeding Wage Rate Changes After January 1, 1967

Step 1. Prepare a list of the wage rates of the four (4) trades that were used in determining the last wage rate change of the local union. Then add the wage rates. This total shall be the combined amount of the wage rates of the trades used in determining the last wage rate change of the local union.

Step 2. List the seven (7) Atlantic City trades and set forth separately the wage rate of each trade and all the increases in fringe benefits each trade obtained since thirty (30) days previous to the effective date of the local union's last wage rate change. The seven (7) Atlantic City trades are the following principal building trades, namely (1) bricklayers, (2) plasterers, (3) carpenters, (4) electricians, (5) sheet metal workers, (6) plumbers and steamfitters, and (7) ironworkers.

Step. 3. Select from the list compiled in Step 2 the four (4) trades with the highest wage rates.

Step 4. Add the wage rates of the four (4) highest trades. Also add all the increases in fringe benefits of these same four (4) trades. Then add together these totals and that amount shall be the combined wage rates and combined fringe increases of the four highest trades.

Step 5. Subtract from the total computed in Step 4 the total computed in Step 1. The remaining amount shall be the gross increase.

Step 6. Divide the gross increase as computed in Step 5 by four (4). The remaining amount shall be the average gross increase.

Step 7. Subtract from the average gross increase as computed in Step 6 the credits agreed upon in Par. 1D.

Step 8. After making the above subtraction, the remaining amount shall be added to the existing wage rate of the Elevator Constructor Mechanics. The result shall be the wage rate for the Elevator Constructor Mechanics.

* * * *

1D. The amount of the credits for changes in wage rates after January 1, 1967, under the above wage plan shall be as follows:

Wage Rate Change	Amount
First	3½¢ plus new vacation credit
Second	5¢ plus new vacation credit
Third	3½¢ plus new vacation credit
Fourth	3¢ plus new vacation credit
Fifth	3¢

The amount of the vacation credit for the first wage rate change shall be one-half percent (½%) of the Elevator Constructor Mechanic's wage rate in effect on January 1, 1967. This same amount shall be the amount of the vacation credit for the second, third and fourth wage rate changes.

1E. It is agreed that the Seitz, Haughton and Cayton arbitration decisions shall continue to be applied in determining what is a wage rate and what is a fringe payment of one of the Atlantic City Plan trades under the above plan. Where an Atlantic City

trade rewords its agreement so that monies that are now considered part of the wage rate under the Seitz and Cayton decisions should properly be considered a fringe benefit payment under the Haughton decision, these monies shall, for the purpose of the above plan, continue to be carried and considered as part of the trade's wage rate. Similarly, monies that are now considered a fringe payment under the Haughton decision shall continue to be carried as a fringe payment where a trade rewords its agreement to include such monies as part of the wage rate.

1F. Increases in fringe benefits of the trades under the above plan shall include increases in employers' contributions and/or payment in case or kind to or for plans, programs or funds for health and welfare, pensions, savings funds, vacation, holidays, supplemental unemployment benefits or any other such kind of fringe. It does not include reimbursement of expenses, changes in hours, change in overtime rates, or increases based upon compounding of benefits resulting from an unchanged percentage of the wage rate. However, a change in percentage of the wage rate for a fringe benefit shall be an increase.

1G. For purposes of computation hereunder, all increases in fringe benefits shall be translated where necessary into cents per hour.

1H. No trade increase in rate or fringe benefit shall be used in more than one wage increase request hereunder. There shall be no duplication of increases.

Par. 2. Agreement upon the wage rate may continue as long as satisfactory to both parties, but no change in wage rate shall be made more often than eleven (11) months. Thirty (30) days' notice in writing shall be given by either party of a desire to make such change and such written notice shall constitute cause for a meeting of both parties.

Change in wage rates shall not be effective in less than thirty (30) days after the effective date of the last wage rate change used in determining the Elevator Constructor Mechanic's and Elevator Constructor Helper's wage rates.

1972-77 Standard Agreement

ARTICLE V

Wages

* * * *

Wage Rate Changes
After March 23, 1972

* * * *

Step 7. Add the average gross increase computed in Step 6 to the existing wage rate of the Elevator Constructor Mechanics.

Step 8. Subtract from the total computed in Step 7 the credits agreed upon in Paragraph 1E, and the result shall be the wage rate for the Elevator Constructor Mechanics.

III. *Summary of Relevant Evidence*

For many years prior to 1967, the wage rates of elevator constructors were determined by application of the Atlantic City Plan, adopted by the parties in 1921, and set out in Article V, paragraph 1A of the 1962-1966 Standard Agreement. At the time the Atlantic City Plan was adopted, compensation in the building trades was almost exclusively in the form of wages, with little, if any, provision for fringe benefits. This method of compensation continued almost unchanged until the early 1950's, when fringe benefits made their appearance in some construction industry contracts.[1] Along with these

[1] The IUEC, for example, negotiated a welfare plan in 1951 and a pension plan in 1962.

benefits came a series of disputes in the elevator construction industry about the extent to which fringe benefits obtained by other trades should be treated as wages for purposes of calculating the wage rates to which elevator constructors were entitled by virtue of the Atlantic City Plan.

These disputes led to a series of arbitration awards in the mid-1960's. In 1964, arbitrator Peter Seitz held that the cost of vacation and welfare benefits which had been deducted from the negotiated wage rate of a building trades local should be included in that local's wage rate for purposes of the Atlantic City formula. In 1965, arbitrator Ronald Haughton held that the cost of vacation and holiday benefits which were established independently of the wage rate of a building trades local should be excluded from that local's wage rate for purposes of the Atlantic City formula. In 1966, arbitrator Nathan Cayton held that the cost of pension benefits which were deducted from the negotiated wage rate of a building trades local should be included in the wage rate of that local for purposes of the Atlantic City formula.

These awards served to exacerbate, rather than solve, the problem of whether the fringe benefits of other building trades locals should be treated as wages for purposes of the Atlantic City formula. Approximately 100 local wage rates are determined each year under the Atlantic City formula, and for each one the parties would have to agree on whether each of the fringes negotiated by the other trades in the relevant locality had been deducted from that trade's wage rate, and so was to be included in the elevator constructor's wage rate under the Seitz and Cayton decisions, or had been established independently of the trade's wage rate, and so excluded under the Haughton decision.

Because the Employers wanted to avoid constant disputes as to whether the Seitz and Cayton decisions applied to a particular fringe, or whether the Haughton

decision applied, they entered the 1966 negotiations with the goal of altering the Atlantic City formula to contain a clear provision for the treatment of fringes. Basically, NEII proposed to eliminate fringe benefit costs entirely from the Atlantic City formula, and to negotiate contributions for fringe benefits independently of that formula.

The Union, too, entered the 1966 negotiations with the goal of altering the Atlantic City formula, albeit for a slightly different reason. It feared that many of the fringes negotiated by other trades would be found to fall under the Haughton category, with the result that they would be excluded from wages, and the elevator constructors would not get the benefit of them for purposes of increasing their own wage rates. Thus, the Union proposed to calculate wage rates on the basis of the combined wage rates and fringe benefits of the other trades, and to provide fringe benefits for elevator constructors over and above the wage rate established by this formula.

According to Union General President Everett Treadway, who was a member of the Union's bargaining team for the 1966-67 negotiations, the Union also had another purpose in proposing that the original Atlantic City formula be amended. That formula, the Union concedes, could lead to a decrease, as well as an increase, in wages for elevator constructors. While Mr. Treadway testified that, to the best of his knowledge, no such wage decreases had occurred prior to 1966, he further testified that one of the Union's objectives in approaching the 1966 negotiations was to amend the Atlantic City formula to insure that no such decrease could take place.

According to Mr. Treadway, this objective was discussed within the Union negotiating committee, and he believed, when the 1967 Agreement was signed, that it had been achieved. As to whether the Union's objective of altering the Atlantic City formula to prevent wage decreases had been discussed at the bargaining table,

Mr. Treadway's position was equivocal. In an affidavit submitted in support of the Union's efforts to obtain an injunction against the Cedar Rapids wage decrease, Mr. Treadway stated:

> I was present at and personally involved in the negotiations that resulted in these changes in the Atlantic City Plan and the 1967-1972 Standard Agreement; and while I cannot say whether any of the employer representatives who participated in the negotiations recognized at that time the significance of this change in language, I can unequivocally state that I and other union representatives recognized it and felt that we had won significant protection for our members against any possible lowering of wages.

Mr. Treadway testified that the foregoing affidavit had been hurriedly prepared, and that at the time he prepared it he could not say that there had been actual face to face discussions with the Employer negotiators concerning the Union's desire to bar wage decreases. However, Mr. Treadway testified, he had since read minutes and documents that had refreshed his memory.[2] After having read those minutes and documents, Mr. Treadway testified, he could recall that the subject of wage decreases had been discussed by the Union with Employer representatives. Those discussions took place after the FMCS mediator entered the negotiations in March, 1967. Mr. Treadway later testified, however, that while he could recall discussions with the mediator concerning the subject of wage decreases, he could not honestly say who else was present.

The 1966 negotiations, which had begun in October, 1966, and resulted in a strike in February, 1967, con-

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[2] No such minutes were introduced into evidence by the Union. One document was introduced, a post-negotiation letter of April 11, 1967, from H.L. Turner, chairman of the Employer negotiating committee, to Richard W. Williams, then Union General President. That letter is set out at p. 15, *infra*.

cluded on March 23, 1967, and the 1967-72 Standard Agreement was signed, when each party retreated from its initial position regarding the treatment of fringes paid to other trades for purposes of determining elevator constructors wages. In place of either total inclusion or total exclusion, the parties agreed that fringe benefit increases earned by other trades would be included in the Atlantic City formula for the purpose of determining wages, but that the Employers would receive credit, in the wage rate calculation, for the amount of fringes paid by them under the Agreement.[3]

Subsequent to the signing of the 1967 Agreement, the Union distributed to all its locals copies of the new Agreement, and a "Message from International Headquarters" containing what the Union described as a brief summary of the principal changes in the new Standard Agreement. With respect to wage rates, the Union's message stated:

> Re: Wage Rates (Article V)
>
> Another major objective in negotiations was to correct the inequities of the Atlantic City Plan by obtaining a wage formula that allowed the Elevator Constructor to use the increases in wage rates and increases in fringe benefits of other trades. Not only was this objective obtained but the new agreement also provides that, in determining wage rates, the Elevator Constructor will, in the future, use the four highest instead of the five highest of the seven Atlantic City Plan trades.
>
> The new wage plan, set forth in Article V, may, at first, seem confusing. However, once you get used to it, you will find it is very simple. What it boils down to is this: Hereafter, the local unions will select the four trades with the highest wage rates.

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[3] The precise terms of the compromise are set out in the excerpt from the 1967 Agreement, pp. 4-8, *supra*.

They will then average the total increases in wages and fringes that these four trades have received since the local union's last wage rate change. There will be subtracted from this amount the credits set forth in Par. 1D of Article V. The result will be the amount of the increase added to the Elevator Constructor Mechanic's existing wage rate. The helper will continue to receive 70% of the Mechanic's rate.

The using of four trades rather than five will, with few exceptions, give the Elevator Constructor greater increases than in the past. Further, there is good reason to believe that the average fringe increase of the other trades will, over the years, exceed the amount of credits set forth in Par. 1D. In the judgment of your Negotiating Committee, this new wage formula corrects the inequities of the Atlantic City Plan and will provide the Elevator Constructor with greater wage increases.

Also subsequent to the 1966-67 negotiations, H.L. Turner, who had been the Employers' chief negotiator, sent the following letter to Union General President Williams:

Dear Mr. Williams:

It is agreed that during the term of the 1967-71 Standard Agreement the base wage rate of the Elevator Constructor Mechanics in effect prior to any wage rate change request by any local union will not be reduced as a result of the wage computation under the formula set forth in Article V. It is understood that such wage rate changes will be made no sooner than 11 months after the effective date of the last wage rate change and that the new increases in fringe benefits provided for Elevator Constructors by this Standard Agreement will be made effective at the time of the wage rate change for each local union.

> In the event that the amount of the increase in fringe benefits available to the Elevator Constructor in any year is greater than the amount of the average increase in wage rate and fringe benefits of the four trades with the highest hourly wage rates, the wage rate of the Elevator Constructor will be renewed and the fringe benefits available under the Standard Agreement for that year will be made effective. That effective date will be considered as an effective date of increase, and increases in trade rates and fringe benefits will be measured from 30 days previous to that date for future wage computations.

According to Mr. Turner, the purpose of this letter was to assure the Union that if, during the term of the 1967 Agreement, the wage and fringe increases of the other trades were less than the fringe increases payable under the Agreement, the Employers would not decrease the base wage rate. Mr. Turner testified that neither the Employers nor the Union anticipated that the fringe increases of the other trades would be less than the fringe increases of the elevator constructors, and that the purpose of this letter was to guard against the unexpected.[4]

Mr. Turner also testified that at the time of the negotiations for the 1967 Agreement, the building trades had consistently been receiving large wage increases, and there was nobody in the construction industry, labor or management, who gave any thought to the possibility of wage decreases. Thus, he stated, during the entire 1966-67 negotiations there was never any discussion of the effect of a wage decrease in the other trades on the wages of elevator constructors.[5]

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[4] Mr. Treadway testified that in the period preceding the 1966-67 negotiations the fringe increases of the other trades had been exceeding those of the elevator constructors.

[5] In support of Mr. Turner's testimony that the possibility of wage decreases in the building trades was not contemplated by

Article V of the 1972-77 Standard Agreement differs from Article V of the 1967-72 Agreement only in the respect that Steps 7 and 8 are reversed. According to Mr. Treadway, this change was sought by the Employers because they thought that the fringe increases demanded by the Union were exorbitant. They wanted to be certain that if the elevator constructors increases exceeded the average increase in wages and fringes of the other trades, the Employers would get full credit in determining wages under the Atlantic City formula for the increases received by the elevator constructors, even if that meant a wage decrease for elevator constructors. The Union agreed that wages could be decreased to the extent that the fringe increase credit of Paragraph 1E exceeded the average wage and fringe increases of the other trades.[6]

There have been no relevant changes in Article V of the Standard Agreement subsequent to 1972 (other than an increase in the amount of the fringe benefit credits set out in Paragraph 1E). Thus, for all practical purposes, the controlling contractual provisions, for purposes of this dispute, are those contained in the 1967 Agreement.

IV. *Discussion*

The central issue presented by this case is whether the Employers were authorized by Article V of the 1967 Agreement, as carried forward into the 1982 Agreement, to decrease the Cedar Rapids wage rate on the basis of decreases in the wage rates of the four highest paid building trades in the Cedar Rapids area.

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either party to the 1966-67 negotiations, the Employers introduced evidence that from 1966 through 1982 the wages of the Cedar Rapids building trades increased every year. The first year of wage decrease was 1983.

[6] It is on the basis of this provision of the 1972 Agreement, carried forth through the 1982 Agreement, that the Union does not challenge 31 cents of the 1983 Cedar Rapids decrease.

The Union makes two basic arguments in support of its position that the wage rate decrease was not authorized. First, the Union argues, the language of Article V authorizes only increases in wage rates based on wages paid to other building trades locals. There is no reference to wage decreases based on the wages paid to other building trades locals, and the Employers have no power to make such decreases. Because the language of Article V is clear and unambiguous, that language must control, and there is no need or justification for resorting to bargaining history to determine its meaning. Second, if bargaining history is examined, that history supports the Union's position.

The Union's initial argument, though not without strength, is not sufficiently powerful to warrant a resolution of this case without a full examination of bargaining history. To be sure, Article V on its face refers only to wage increases. On the other hand, it does not explicitly bar wage decreases. Additionally, it is undisputed that for forty-five years subsequent to the adoption of the Atlantic City Plan, the Employers did have the authority to decrease wages based upon decreases in the wages paid to other trades. If the parties intended to deprive the Employers of that authority in the 1967 Agreement, the intent to make such a significant change should be plain in the bargaining history. This fact, too, warrants examination of that history.

Turning to the history of the 1966-67 negotiations, the Union contends that one of its primary objectives in those negotiations was to amend the Atlantic City Plan so as to bar wage decreases based upon decreased wages in other trades. The Union further contends that that objective was discussed at the bargaining table and accepted by the Employer negotiators. In support of this contention, the Union relies on the testimony of General President Everett Treadway, who participated in the 1966-67 negotiations as a member of the Union's ne-

gotiating committee. Both Mr. Treadway's testimony and the Union's contentions are, however, undercut by a number of factors.

Initially, Mr. Treadway conceded that at the time of the 1966-67 negotiations he had no knowledge that any wage decreases had taken place pursuant to the Atlantic City Plan. Nor did the Union introduce other evidence that such decreases had occurred and were known to the Union negotiators. To the contrary, H.L. Turner, the Employers' chief negotiator, testified that as of 1966-67, there had been a consistent pattern of increases in building trade wages, and that neither party contemplated the possibility that such wages might decrease in the foreseeable future.[7] In view of the evidence that building trade wages were not known to the Union negotiators to have decreased prior to 1966, and that there was no basis for assuming that such decreases were likely in the foreseeable future, it is unlikely that the Union would have entered the 1966 negotiations with the goal of amending the Atlantic City Plan so as to prevent such unforeseen decreases from decreasing the wages of elevator constructors.

If, however, that had been a Union objective, fought for and won at the bargaining table, one would expect the Union to proclaim its victory in its post-negotiation message to its members. In fact, however, that message, in citing the improvements that had been obtained in Article V, referred only to the Union's success in obtaining a wage formula that included the increases in fringe benefits of other trades, and that used the four highest, rather than the five highest, of the Atlantic City Plan trades. The message was absolutely silent with respect

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[7] The unlikelihood of wage decreases as of 1966-67 was supported, at least in part, by evidence that in the Cedar Rapids area building trade wages increased every year from 1967 through and including 1982. The Union does not argue that Cedar Rapids was unrepresentative in this respect.

to the attainment of the alleged objective of amending the Atlantic City Plan so as to bar wage decreases due to decreases in the wages of other trades. This, too, suggests that the Union neither had, nor thought it had, attained any such objective.

The Union's position is also undercut by inconsistencies in Mr. Treadway's testimony. Initially, Mr. Treadway's affidavit, submitted in support of the Union's request for an injunction, made no reference to any discussion with Employer representatives of the Union's desire to bar wage decreases. At the arbitration hearing, however, Mr. Treadway testified that since preparing that affidavit he had consulted minutes and documents that had refreshed his recollection, and that he did presently recall such discussions with Employer representatives. No such minutes were entered into evidence, however, and the sole document that was introduced, Mr. Turner's letter of April 11, 1967, made no reference whatsoever to any discussions. Finally, Mr. Treadway conceded on cross-examination that while he could recall discussions with the mediator concerning wage decreases he could not honestly say who else was present at those discussions.[8]

Not only was Mr. Treadway's testimony with respect to the alleged discussions with Employer representatives on the subject of wage decreases inconsistent, it was inherently implausible. Thus, Mr. Treadway testified that this subject was not discussed with Employer representa-

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[8] Contrary to Mr. Treadway, Mr. Turner testified that there was no discussion of wage decreases based on decreases in the wages of other trades. The Union attempts to portray that testimony as inconsistent with other portions of Mr. Turner's testimony regarding the foreseeability of a situation such as the Cedar Rapids wage decrease, but that attempt is unconvincing. The line of questioning to which the Union refers is quite ambiguous, and provides no basis on which to impeach Mr. Turner's testimony that there had been no discussion in the 1966-7 negotiations of the possibility of wage decreases based upon wage decreases of other trades.

tives at any time from October, 1966, when negotiations began, through February, 1967, when the Union went out on strike. Rather, he testified, the first discussion of this subject took place after the FMCS mediator entered the negotiations in March, 1967. It is wholly implausible, however, that a subject of such importance, if it was one of the Union's objectives, would not have been discussed with the Employers long before mediation began, some four or five months after the commencement of negotiations. In sum, Mr. Treadway's testimony is so inconsistent and implausible as to weaken, rather than strengthen, the Union's position that it sought, discussed, and obtained a change in the Atlantic City Plan that would bar wage decreases for elevator constructors resulting from wage decreases of other trades.

The Union next seeks to support its position by reference to Mr. Turner's April 11, 1967, letter to Mr. Williams. In particular, the Union relies on the first sentence of that letter, which states:

> It is agreed that during the term of the 1967-71 Standard Agreement the base wage rate of the Elevator Constructor Mechanics in effect prior to any wage rate change request by any local union will not be reduced as a result of the wage computation under the formula set forth in Article V.

This sentence, the Union argues, plainly and unequivocally supports its position that the parties had agreed that the 1967 amendments to the Atlantic City formula barred any way decreases.

The Employers' response to this argument is that the first sentence cannot be read in isolation. Rather, the letter must be read in its entirety. When that is done, the Employers contend, it is apparent that the only bar to wage decreases that they agreed to was that there would be no such decreases in the event that the average increase in wages and fringes of the other trades was

less than the increase in fringes due the elevator constructors under Article V, Paragraph 1E.

The Union, in turn, argues that as of the 1967 Agreement, Steps 7 and 8 of the wage rate formula had not yet been reversed, as they ultimately were in 1972, to permit the subtraction of Paragraph 1E credits directly from the wage rate, rather than from the average gross increase. Hence, Mr. Turner could not have been writing to agree that Paragraph 1E credits would not be subtracted in such a fashion as to result in a wage decrease. Instead, he must have been writing to confirm the parties' agreement that the amended Atlantic City formula could not, under any circumstances, be used to result in a wage decrease.

The Union's arguments are not persuasive. The fringe benefit credit was a new concept, introduced into the 1967 Agreement for the first time, and Article V was not clear as to what would happen if the amount of the credit to which the Employers were entitled exceeded the amount of the average increase in wages and fringes of the other trades. Step 8 provided that after the credit was subtracted from the average gross increase, the remaining amount should be added to the existing wage rate of the elevator constructors. It did not, however, provide for the contingency that the amount remaining after the subtraction would be a negative number. Under those circumstances, if the Employers did not plan to decrease wages in this contingency, it is entirely plausible that they would so state, without ever considering or addressing their rights in the event that the Article V formula led to a decrease in wage rates resulting from the alternate contingency of a decrease in wage rates of the other trades.

The Union contends that it is wholly implausible that the Employers would have spent weeks negotiating a detailed wage formula, and then immediately have turned around and agreed not to use the result generated by

that formula. Mr. Turner testified, however, that neither the Employers nor the Union anticipated that the theoretically possible result of NEII fringe increases being greater than the wage and fringe increases of the other trades was likely. Indeed, the Union's post-strike message to its members makes precisely this point. Hence, the Employers could reassure the Union, at little risk to them, that the assurance is not, contrary to the Union's contention, at all implausible.

The Union's next argument is that the reversal of Steps 7 and 8 in the 1972 Agreement, for the admitted purpose of authorizing wage decreases based on NEII fringe increases exceeding the wage and fringe increases of other trades, undercuts such decreases, as well as the 1967 formula authorized such decreases, as well as the Employers' argument that the purpose of Mr. Turner's letter was solely to assure the Union that such decreases would not occur. For, the Union argues, if the 1967 formula authorized decreases under those circumstances there would have been no need to reverse Steps 7 and 8 in 1972 to authorize such decreases.

This argument, too, is unpersuasive. The Employers had agreed, by virtue of Mr. Turner's 1967 letter, that they would limit the amount of the Paragraph 1E credit to any increase in wages due under the Article V formula, and would not take advantage of any decrease in wages to which they might be entitled by virtue of that credit. In 1972, with Union fringe demands increasing, the Employers wanted to be able to take full advantage of whatever credit against wages they were entitled to by virtue of Paragraph 1E, including the possibility of a wage decrease resulting from that credit. They needed Union agreement to do so in light of their explicit 1967 agreement contained in Mr. Turner's letter not to do so. Hence, the Employers' 1972 action in seeking explicit authority to decrease wages based on increased fringes demonstrates neither that the 1967 Standard Agreement

did not authorize such decreases, that Mr. Turner's letter was not designed to waive that authority, nor, most important, that Mr. Turner's letter constituted a recognition that the Union had obtained in the 1967 Standard Agreement a bar against any wage decreases for any reason whatsoever, including decreases in the wages received by the other building trades.

In sum, I am not persuaded that Mr. Turner's letter of April 11, 1967, supports the Union's position in this case. I reach this conclusion not only on the basis of the arguments already discussed, but also on the basis of the central fact that any ambiguity in that letter must be construed in light of the fact that the parties had just negotiated a new contractual provision dealing with credit for NEII fringe benefit increases in the application of the Atlantic City formula. It is entirely natural that there should have been uncertainties about the application of that credit, and that some of those uncertainties should have been addressed by the Employers. Conversely, there is no credible evidence, apart from whatever ambiguities may lurk in Mr. Turner's letter, that the parties had contemplated or discussed the possibility of wage decreases in the other building trades, and the effect such decreases would have on the wages of the elevator constructors under the revised Atlantic City plan. Hence, the most plausible interpretation of Mr. Turner's letter, which I accept, is that the first sentence is not to be construed apart from the remainder, and that, taken in its entirety, that letter does not support the Union's position with respect to the proper interpretation of Article V of the 1967 Agreement.

The Union's remaining arguments are equally without merit, and do not require extended discussion. The Employers' assertion in a 1970 proceeding before arbitrator Sidney Cahn that the 1967 Agreement dealt with wage increases, while previous Agreements had been

based on an average wage rate concept, is irrelevant in this case. The issue before arbitrator Cahn was not the effect of a decrease in the wage rates of other trades, and the Employers' reference to the 1967 Agreement as dealing with wage increases can hardly be taken as an expression of their understanding as to the effect of decreases.

The decision of arbitrator Charles La Cugna in *Hecla Mining Co. and USWA, Local 5114*, 81 L.A. 193 (1983), is similarly unpersuasive. In that case, the arbitrator, though purporting not to examine bargaining history, or the intent of the parties, noted that the parties, at the time they signed their contract, "were well aware of the significance and meaning of the now disputed contract language" (Id. at 194). As I have already noted, that is most emphatically not true in the instant case.

Indeed, it is the history of the parties' negotiations upon which the decision in this case as to the proper interpretation of Article V squarely rests. If one were to look solely at the language of Article V, the Union might well prevail (despite the arguable ambiguity caused by the absence of a specific prohibition on wage decreases). It would, however, be inappropriate for an arbitrator, charged with the duty of contract interpretation, to look solely at the language of the contract, and to ignore other indicators of the parties' intent, if such indicators exist. To be sure, the clearer the language of the contract itself, the greater is the burden on the party asserting that the contract should be interpreted in a manner contrary to that language. In the instant case, however, regardless of how substantial the burden of proof that is placed on the Employers, they have sustained that burden. The bargaining history of the 1967 Agreement proves beyond any substantial doubt that the change in the language of the Atlantic City

formula did not represent the existence of a mutual intent to deprive the Employers of the power that they had for forty-five years under the original Atlantic City formula to decrease the wages of elevator constructors based upon decreases in the wages of the Atlantic City Plan building trades. In the absence of any indication by the Union that it sought to deprive the Employers of that power, the Employers were warranted in assuming the such power continued to exist, and the Union, which caused that assumption, is bound by it.[9]

The Union's final argument is that by decreasing wages without Union consent the Employers violated Article V, Paragraph 6 of the Standard Agreement. This argument, too, is without merit. The power of either party to demand a change in wage rates at the appropriate times existed under the original Atlantic City Plan, as embodied in Article V, Paragraph 3 of the 1962 Agreement (carried forward as Article V, Paragraph 2), and the addition of Paragraph 6 was not intended to deprive them of that power. Indeed, a contrary interpretation of these paragraphs, requiring mutual consent to change wages, would effectively deprive the Employers of precisely that power which the bargaining history of Article V shows they were intended to have—to decrease wages based upon the decreased wages of other trades. For, if mutual consent to change wage rates were necessary, the Union could block wage decreases based upon wage decreases of other trades by refusing to give its consent. Thus, Article V, Paragraph 6 may not reasonably be interpreted to require Union consent to the Employers' exercise of their Article V,

---

[9] In that sense, there was mutual intent with respect to the Employers' power to decrease wages. Hence, there is no merit to the Union's alternative argument that the Employers' act of decreasing wages constituted unilateral action in violation of section 8(a)(5) of the Labor Act.

Paragraph 3 power to change wage rates unilaterally at the appropriate time.[10]

Award

The grievance is denied.

/s/ Stephen B. Goldberg
STEPHEN B. GOLDBERG
Arbitrator

Chicago, Illinois

April 23, 1984

[10] This conclusion does not render Article V, Paragraph 6 meaningless. As Mr. Treadway testified, the purpose of that paragraph is to enable the Union and the Employers to impose a wage rate change on a protesting Local if they jointly conclude that such a change is necessary to protect the fringe benefit funds.

No. 84-1788

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In The

Supreme Court of the United States

October Term, 1984

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO,

Petitioner,

vs.

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether the District Court and Court of Appeals erred in holding that an arbitrator's interpretation of a wage formula drew its essence from the collective bargaining agreement where the arbitrator found that the language of the collective bargaining agreement did not clearly or definitively resolve a dispute relating to a wage formula and relied upon evidence of the history of bargaining to ascertain the intent of the employer and the union in negotiating the wage formula.

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INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO,

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NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

COUNTER STATEMENT OF THE FACTS

1. Parties and History of Collective Bargaining

National Elevator Industry, Inc. ("NEII") is a multi-employer trade association which represents employers engaged in the

elevator business. The International Union of Elevator Constructors ("IUEC") is an international union representing elevator mechanics and helpers employed by elevator companies throughout the United States. There is a long history of collective bargaining between NEII and the IUEC. The collective bargaining agreement is known as the "Standard Agreement" in that it covers the wages, hours and working conditions of elevator mechanics and helpers on a nationwide basis.

2. The Atlantic City Formula

Although the Standard Agreement applies on a nationwide basis, the wage rates paid to mechanics and helpers vary from one geographic area to another.

In 1921, the parties agreed upon a wage formula which has come to be known as the "Atlantic City formula". Although details of the Atlantic City formula have changed from time to time, the basic concept since 1921 has always been the same, namely, that the wage rate paid to the elevator constructor is based upon the wage rates of the other building trades in the geographic area in which the elevator constructor works.

Under the Standard Agreement, the wage formula is calculated separately for each geographic area covered by the IUEC's local unions. Over the last several years there have been approximately 98 wage changes calculated under the Atlantic City formula each year. The calculations have been routinely made by the NEII staff in New York City, which then sends written notification of the amount and effective date of the new wage rate to the IUEC, the IUEC local union and the individual employers that are engaged in business in the geographic area for which the wage rate is applicable.

3. Reductions in Wage Rates in Cedar Rapids in 1983

In response to the competition from non-union shops in the Cedar Rapids area, the building trades unions in Cedar Rapids agreed to accept substantial wage rate reductions in the spring of 1983, as follows:

	WAGES	FRINGE BENEFITS	TOTAL
Iron Workers:	$2.85 per hour reduction	$.06 per hour increase	$2.79 total reduction
Carpenters:	$2.85 per hour reduction	$.05 per hour increase	$2.80 total reduction
Sheetmetal Workers:	$3.08 per hour reduction	$.50 per hour increase	$2.58 total reduction
Bricklayers:	$1.50 per hour reduction	$.02 per hour increase	$1.48 total reduction
Electricians:	$2.62 per hour reduction	No Change	$2.62 total reduction
Plumbers:	$2.80 per hour reduction	$.40 per hour increase	$2.40 total reduction
Plasterers:	$2.35 per hour reduction	No Change	$2.35 total reduction

Applying the Atlantic City formula to the Cedar Rapids area, NEII determined that the wage rate for the elevator constructors in the Cedar Rapids area should be $12.54 per hour. This was

a reduction of $2.54 per hour from the prior wage rate for an elevator mechanic in Cedar Rapids.

On August 1, 1983, NEII gave written notice of NEII's desire to change the wage rate in Cedar Rapids. The parties met to discuss the proposed change on August 10. At this meeting the IUEC did not deny that the other building trades in Cedar Rapids had in fact agreed to wage rate reductions. However, the IUEC took the position that under the Atlantic City formula no reduction was permissible other than a 31-cent reduction for fringe benefits.

The IUEC then sought to obtain an injunction barring implementation of the wage rate change in the District Court. After the injunction was denied, the change was implemented on August 31, 1983.

4. Positions of the Parties at the Arbitration Level

At the arbitration level, the *IUEC acknowleged that the Atlantic City formula as written in 1921 permitted either increases or decreases in the wage rates of an elevator constructor,* depending upon whether the average wage rates of the other building trades rose or fell. The IUEC argued, however, that there was a modification of the Atlantic City formula in 1967, by which modification the wage rate of the elevator constructor became a guaranteed wage rate not subject to reduction even if the other building trades in the same locality agreed to accept wage rate reductions.

NEII agreed with the IUEC that the Atlantic City formula as originally written permitted either increases or decreases in the wage rate and also agreed that the Atlantic City formula was modified in 1967. However, NEII flatly denied that the parties ever agreed that the Atlantic City formula was modified so that it became a formula by which the elevator constructors only used

the average of wage rates for other trades if that average went up but did not use the average if the average went down. NEII took the position that during protracted negotiations over a period of six months in 1967, including a seven-week strike, this concept was *never* discussed by the parties. NEII took the position that in 1967 the parties modified the Atlantic City formula for only one reason:

> *to establish a method of accounting for the cost of fringe benefits under the formula.*

5. Events Leading Up to 1967 Negotiations

As shown above, the issue in the arbitration turned upon the intent of the parties in modifying the Atlantic City formula in 1967.

Up until the early 1950's, most building trades locals throughout the United States negotiated collective bargaining agreements under which all or virtually all of the total compensation paid to the tradesmen was paid in the form of wages. Prior to the 1950's, the collective bargaining agreements in the building trades generally did not provide for so-called "fringe benefits" such as pension, health and welfare, paid vacations and paid holidays.

Beginning sometime in the 1950's the various building trades locals began to negotiate provisions for fringe benefits in their collective bargaining agreements. As more and more of the building trades locals began to include fringe benefits in their collective bargaining agreements, questions arose as to the proper method of accounting for the cost of fringe benefits under the Atlantic City formula.

In 1964, 1965 and 1966, there were several different arbitration awards dealing with questions concerning the proper accounting

of fringe benefits under the Atlantic City formula. In 1964, Arbitrator Peter Seitz held in two lengthy opinions that the cost of vacation and welfare benefits which have been deducted from the negotiated wage rate of a building trades local should be included in the local's wage rate for the purpose of the Atlantic City formula. In 1965, Arbitrator Ronald Haughton held that the cost of vacation and holidays which are established independently of the wage rate of a building trades local should be excluded from the local's wage rate for the purpose of the Atlantic City formula. In 1966, Arbitrator Nathan Cayton held that the cost of pension benefits which are deducted from the negotiated wage rate of a building trades local should be included in the wage rate of the building trades local for the purpose of the Atlantic City formula.

These four arbitration awards did not resolve the problems of accounting for fringe benefits to the complete satisfaction of either the IUEC or NEII for several reasons. First, the situation as to each building trades local was transitory. A particular local could be considered a "Seitz", "Haughton" or "Cayton" type of local with respect to one type of fringe benefit in one year and then change its category in the next year by rewording its collective bargaining agreement. This created serious administrative problems and also created the possibility of results which could be regarded as inequitable by the employers or the employees. Second, the IUEC took the position that a change in the Atlantic City formula was necessary to keep the elevator constructors from falling behind the other building trades because of the fact that these other trades had begun to allocate a greater proportion of their total compensation package to fringe benefits.

6. Proposed Solutions by Parties in the 1967 Negotiations

In the 1967 negotiations, the IUEC and NEII took entirely different approaches to the fringe benefit question. Finally, after

a seven-week strike, the parties reached agreement upon a compromise. First, the formula adopted the reasoning of the Seitz, Haughton and Cayton arbitration awards but made an important addition to these awards by providing that monies considered to be part of the wage rate of a particular local under the Seitz and Cayton decisions would continue to be so considered despite any rewording of the collective bargaining agreement by that local, and that monies considered to be a fringe payment under the Haughton decision would continue to be so considered despite such rewording.

Next, the formula itself was recast into eight steps to separately compute (a) the wage rates of the Atlantic City trades and (b) the increases in fringe benefits for those trades.

There were several other changes in the wage formula, the details of which are beyond the scope of this brief. In summary, *all* of these additional changes dealt with the establishment of a method of accounting for the cost of fringe benefits.

7. Summary and Analysis of Arbitrator Goldberg's Opinion

Arbitrator Goldberg expressly held that "regardless of how substantial the burden of proof that is placed on the Employers, they have sustained that burden." However, like many other arbitrators, in his opinion Arbitrator Goldberg concentrated on expressing his reasons for rejecting the IUEC's contentions. Inasmuch as Arbitrator Goldberg's opinion is reprinted in its entirety in the Appendix to the IUEC's petition for certiorari, it is unneccessary to repeat herein Arbitrator Goldberg's responses to the IUEC's arguments. However, there was substantial evidence before Arbitrator Goldberg which affirmatively supported NEII's position which Arbitrator Goldberg passed over lightly in his opinion or did not mention at all. This evidence may be summarized as follows:

A. Analysis of the revision of the wage formula shows that each and every substantive change in 1967 was a change relating to the method of separately accounting for the cost of fringe benefits.

B. NEII precisely followed all of the mathematical steps of the wage formula in reaching the mathematical result that the new wage rate for the mechanics in Cedar Rapids should be $12.54 per hour. The IUEC's argument that $12.54 is not the correct hourly wage rate is a purely semantic argument in which the IUEC takes the word "increase" out of context and attempts to make one word in a complicated formula paramount to the remainder of the formula. Putting the IUEC's argument in its best light, the use of the word "increase", in context with the rest of the wage formula, would arguably create an ambiguity in the wage formula.

Arbitrator Goldberg correctly recognized that the wage formula itself does not clearly and unambiguously support the IUEC's contention and thus he examined the other evidence of the intent of the parties. His careful examination of all of such evidence showed that NEII had sustained any burden of proof which might be placed upon it.

The IUEC virtually ignores a transcript of 196 pages and 21 employer exhibits which demonstrate beyond cavil what the IUEC itself understood the contract to be in 1967. The IUEC entirely ignores the 46-year bargaining history which preceded the collective bargaining negotiations in 1967. The IUEC ignores several other arbitration cases which support NEII's position. In essence, the IUEC makes the same narrow semantic argument to this Court which the Arbitrator, the District Court and the Court of Appeals rejected on the basis of the record as a whole.

C. The IUEC's contemporaneous statements of its bargaining objectives in 1967 support NEII's position. Arbitrator Goldberg's

opinion quotes from the explanation which the IUEC gave to its members after the negotiations were concluded. In addition, during the seven-week strike, the IUEC published letters addressed "To the Contract Service Customers of Struck Elevator Companies." The first two paragraphs of these letters state as follows:

> "To the Contract Service Customers of Struck Elevator Companies
>
> * * *
>
> You are entitled to know the truth about our strike and our wage demands. *Every local of the Elevator Constructors has, since 1921, determined the wage rate of its members by a formula of averaging the wage rate of five highest of seven building trades unions in their areas.* The seven unions are: Bricklayers, Ironworkers, Electricians, Plumbers, and Steamfitters, Plasterers, Carpenters, and Sheet Metal Workers. *With the development of fringe benefits both NEMI and the Elevator Constructors have recognized that a new formula must be developed. Our dispute is over what it should be. We want to use the same formula but average increases in total compensation. We can assure you that such a formula will only keep the Elevator Constructors on a par with similar building trades unions."* (Emphasis supplied.)

The letter clearly says:

1. That both IUEC and NEII recognized that it was necessary to develop a new formula because of *"the development of fringe benefits."*

2. That IUEC wanted "to use the same formula but average increases *in total compensation.*"

3. That the formula desired by the IUEC would *"only"* keep the elevator constructors *"on a par"* with similar building trades unions.

The IUEC wanted to use "the same formula" — which the IUEC concedes in its letter was an "averaging" formula. The effect of including fringe benefits in the calculations would, according to the IUEC, "only" keep the elevator constructors "on a par" with similar building trades unions.

The phrase "on a par" cannot reasonably be construed as giving the elevator constructors *guaranteed* wage rates not subject to reduction even if, as in Cedar Rapids, the wage rates of similar building trades suffered substantial reductions.

D. Part of the evidence before Arbitrator Goldberg was a prior arbitration award in which the IUEC took a position which is inconsistent with the position taken by the IUEC in the instant case. As recently as April 2, 1982, Arbitrator Sylvester Garrett issued an opinion and award dealing with the issue of whether "travel pay" paid to other building trades unions should be included as part of the wage rate of the other building trades unions for the purpose of the Atlantic City formula. Arbitrator Garrett's findings, as well as much of the IUEC's arguments in that case, support NEII's position in the instant case.

Thus, Arbitrator Garrett *described the IUEC's contentions* in the case as follows:

> "The history of the Article V wage formula, first adopted in 1921, is cited to support this conclusion. Originally, the term 'wage rate' did not require

any definition since virtually all building trades employees in 1921 were paid a single hourly wage which constituted all of their compensation for services rendered. *Thus, the intent of the parties in 1921 clearly was to have the total compensation of the Elevator Constructors determined by averaging the total compensation of the other top trades."*

"This basic intent has remained the same over the years in the Union view, even though the parties have had to modify the wage formula in response to innovations in the construction industry. Thus, in 1967 the formula was modified to take into account the indirect form of compensation known as fringe benefits. The fringe increases of other crafts now are computed separately from their wage rate increases and both are plugged into the formula at a different step (Article V, Steps 2-4)."

"In short, Article V, as now written, divides the other crafts' total compensation into a direct wage category and an indirect fringe benefit category without changing the basic intent."

* * *

"For example, the parties modified the formula in 1967 to take into account the indirect form of compensation known as fringe benefits. Tr. 18-19. The other crafts' fringe increases are now computed separately from their wage rate increases, and both are plugged into the formula at a different step. Art. V, Steps 2-4. *Thus, in its present form Article V divides the other crafts'*

> *total compensation into a direct wage category and an indirect fringe benefit category; but the intent is still the same:* all of the other crafts' compensation for services rendered is to be used in computing the wages of the elevator constructors."

Arbitrator Garrett then made the following finding:

> "It thus is of more than passing interest that *only one basic change appears to have been made in the general scheme of Article V since 1921.* That change occurred when Article V was revised in 1967 to recognize that 'fringe benefits' had emerged as a major monetary element in most building trades agreements, usually negotiated as a significant portion of a 'package' settlement. Since 1967, therefore, Article V has contemplated that 'increases in fringe benefits' (for the respective building trades Unions) will be calculated in cents per hour and plugged into the wage rate determination formula, commencing at Step 4."

The IUEC's brief to Arbitrator Garrett contains the following representations:

> "The agreement expresses the wages of elevator constructors as a function of the wages paid to other crafts in the same locality. Under the Article V formula, local elevator constructors' wages are equal to a *modified average* of the wages for the four most highly paid other crafts in the local area." (Emphasis supplied.)

* * *

"The formula requires the use of a modified method of averaging the wage rates for the four highest crafts which includes a variety of rather complex adjustments." (Emphasis supplied.)

"Indeed, when the analogue to the Article V wage formula was first adopted in 1921, the term 'wage rate' did not require any elaborate definition, because virtually all building trades employees were paid a single hourly wage which constituted all of their compensation for services rendered. *The intent of the parties at that time was clearly to have the total compensation of the elevator constructors determined by averaging the total compensation of the other top trades."*

"This intent has remained the same over the years, although the parties have had to modify the wage formula in response to innovations in the construction industry. For example, the parties modified the formula in 1967 to take into account the indirect form of compensation known as fringe benefits. Tr. 18-19. The other crafts' fringe increases are not computed separately from their wage rate increases, and both are plugged into the formula at a different step. Art. V, Steps 2-4. Thus, in its present form Article V divides the other crafts' total compensation into a direct wage category and an indirect fringe benefit category; *but the intent is still the same:* all of the other crafts' compensation for services rendered is to be used in computing the wages of the elevator constructors." (Emphasis supplied.)

E. Finally, it is undisputed that during the strike in 1967 NEII proposed that, if the cost of fringe benefits were stripped

completely from the formula, NEII would negotiate for fringe benefits independently of the formula and also guarantee a 3% annual increase under the formula itself. The IUEC rejected this proposal. The IUEC termed the offer of a 3% guarantee "meaningless" because "with the exception of one or two locals, all local unions have gotten better than 3% a year under the Atlantic City Plan" as it existed prior to 1967. It would be anomalous, to say the least, to believe that the IUEC, which found an offer of a 3% guaranteed increase to be "meaningless", had as of one of its objectives in negotiations the elimination of the possibility of wage decreases under the formula.

ARGUMENT

I.

The District Court and Court of Appeals correctly applied the appropriate legal standard.

In its statement of the "question presented" in its petition for a writ of certiorari, the IUEC poses a question which makes the unwarranted assumption that Arbitrator Goldberg's opinion construes contractual language "to mean its very opposite." This is simply not the case. In effect, the IUEC is asking this Court to assume that the IUEC's interpretation of the collective bargaining agreement is the only possible interpretation and, based on this unwarranted assumption, to hold that Arbitrator Goldberg's award does not draw its essence from the collective bargaining agreement.

There is no dispute in the instant case concerning the standard which should be applied by a federal District Court in determining whether to confirm or vacate an arbitrator's award. Both parties urged the District Court to apply the test described in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363

U.S. 593 (1960), that is, to determine whether Arbitrator Goldberg's award "drew its essence" from the Standard Agreement.

The District Court held that:

> "After reviewing a 196-page transcript and voluminous exhibits, Goldberg handed down a careful, well-reasoned, 33-page decision in which he concluded that the terms of the collective bargaining agreement between the IUEC and the NEII allowed the employers to reduce the wages of elevator workers when the wages of other construction workers went down. Because this decision 'draws its essence from the collective bargaining agreement,' the Court, as explained above, cannot set it aside."
>
> * * *
>
> "Although the collective bargaining agreement speaks in terms of wage increases, Goldberg quite properly looked to the history of the agreement and found that the use of the word 'increases' was not in any way intended to bar decreases. He appropriately found that there apparently had never been any wage decreases in the construction industry in the past and so the subject of decreases had not been contemplated by either side during the negotiations that led to the signing of the contract. Based on the evidence before him, it cannot be said that Goldberg was incorrect in rejecting the IUEC's claim that some of the changes in the wording of the collective bargaining agreement were intended to eliminate the possibility of wage decreases."

* * *

"Goldberg interpreted the collective bargaining agreement in a manner consistent with the language, intent, and history of the contract."

The Court of Appeals affirmed the District Court "substantially for the reasons stated in the opinion of Judge Goettel."

In its petition for a writ of certiorari, the IUEC argues, in substance, that the District Court and the Court of Appeals misapplied the *Steelworkers* test. As noted *supra*, this is circular reasoning which begins with the unsupportable assumption that the IUEC's interpretation of the wage formula is the only possible interpretation.

The IUEC's argument in this case is purely a semantic argument. In the 1967 negotiations the parties never discussed the proposition that the formula should be changed so that there could never be a reduction in the wage rate of the elevator constructor even though the wage rates of the other building trades were reduced. The employers never agreed to such a concept. Even though there was a seven-week strike, this proposition was never discussed at the bargaining table. Indeed, it would be highly unlikely that such a discussion would ever have taken place in 1967 because at that time and for many years prior thereto every collective bargaining agreement in the building trades brought forth wage increases. The possibilty that wage rates in the building industry would generally decline was far from anyone's mind.

As noted before, it was certainly not one of the IUEC's stated objectives in the bargaining. Even after the 1967 Standard Agreement was signed, the IUEC never advised its members that the IUEC had achieved what it now claims it has achieved. On

the contrary, (1) what the IUEC told the employers in bargaining and (2) what the IUEC told the general public and (3) what the IUEC told its own membership was that the purpose of the changes in the collective bargaining agreement was to keep the elevator constructors "on a par" with other building trades unions. Keeping "on a par" with the other unions is a far different concept than the concept of guaranteeing that the wages of the elevator constructors would never be reduced under the formula, even though the wage rate of every other building trade union is reduced.

The record shows that in calculating the Cedar Rapids wage rate, NEII precisely followed the mathematical steps of the Atlantic City formula. The IUEC argues that the result achieved by following the mathematical steps of the formula must be rejected because, the IUEC argues, the result is not an "increase" in the wage rate of the elevator constructor. The IUEC's argument rests upon the contention that the use of the word "increase" in describing the result obtained under the formula is controlling over everything else in the formula.

The IUEC's argument ignores the fact that the mathematical steps of the formula support NEII's result. Putting the IUEC's argument in its best light, the use of the word "increase", in context with the rest of the formula, would arguably create an ambiguity in the formula. Any such ambiguity should be resolved by examining the intent of the parties during the 1967 negotiations, an examination which Arbitrator Goldberg found to overwhelmingly support NEII's position.

It must be emphasized that Arbitrator Goldberg correctly evaluated the importance of the fact that the IUEC *concedes that for 46 years,* from 1921 to 1967, the Atlantic City formula was an "averaging" formula. Thus, this is not a case in which Arbitrator Goldberg construed language to give it a meaning that

never previously existed in the industry. *Rather, Arbitrator Goldberg's analysis starts with the premise that the Atlantic City formula was for 46 years an averaging formula and the question is whether the evidence shows that the averaging concept was dropped from the Atlantic City formula and replaced by the concept of a guaranteed wage rate* which could only rise and never fall even though the other building trades unions negotiated wage rate reductions.

It has often been observed that collective bargaining agreements are not negotiated in a vacuum. Prior to the 1967 negotiations, both parties understood the essence of the Atlantic City formula to be a wage rate formula in which the wage rate for the elevator constructor was determined by averaging the wage rates of the other building trades unions in the same geographic locality. The IUEC acknowledges that under this basic averaging concept, the wage rate for the elevator constructors could rise or fall, depending upon the rates for the other trades. The Standard Agreement expressly provides that the formula negotiated in the 1967 negotiations is an amendment of the formula (for the reasons set forth above), not a repudiation of it nor the substitution of a wage rate guarantee for the averaging concept.

II.

The decision of the Court of Appeals for the Second Circuit is not in conflict with the decision of any other circuit.

In its argument to the Second Circuit, the IUEC cited the decisions of several other circuit courts which vacated an arbitrator's award in whole or in part. All of the cases cited by the IUEC are distinguishable from the instant case. The Second Circuit obviously saw no conflict between the affirmance of Arbitrator Goldberg's award and the cases relied upon by the IUEC. The Second Circuit did not find the issue in the instant case

to be of sufficient precedential value to even warrant an opinion. Both the Second Circuit and the District Court had no difficulty in discerning that Arbitrator Goldberg's Award "drew its essence" from the collective bargaining agreement, notwithstanding the fact that there have been other arbitration awards in other cases which have failed to meet this test. It is plainly inaccurate to state that the decision of the Second Circuit is in conflict with the decisions of other Circuits merely because the results reached in applying the *Steelworkers* test differ from case to case.

The IUEC cites *H.K. Porter Company Inc. v. United Saw, File and Steel Products Workers of America,* 333 F.2d 596 (3rd Cir. 1964) as an example of a situation in which the Third Circuit vacated a portion of an arbitrator's award. The *Porter* decision is not in conflict with the instant case. If anything, the general approach in the *Porter* case tends to support NEII.

Porter is a case in which past practice is accepted by the Third Circuit as a basis for modifying the clear and unambiguous terms of a pension plan in one respect but not accepted in another respect. The instant case is entirely different in that Arbitrator Goldberg did not find the modified wage formula to be clear and unambiguous. Rather, Arbitrator Goldberg turned to the history of negotiations between the parties in order to ascertain the intent of a complex wage formula because of the IUEC's claim of an apparent inconsistency between (1) the mathematical directions of the wage formula and (2) the characterization of the results of the mathematical directions.

The IUEC relies upon *Timken Company v. Local Union No. 1123, United Steelworkers of America,* 482 F.2d 1012 (6th Cir. 1973). This is also a case which supports NEII's position rather than the IUEC's position. In *Timken,* the Sixth Circuit overturned an arbitrator's award wherein an arbitrator substituted his judgment of a "voluntary quit" in place of an express definition

of the term in the collective bargaining agreement. In a footnote appearing at page 1015, the Sixth Circuit stated, in part, as follows:

> "In this regard, we intimate no view as to the merits, but, rather, *merely notice that even though the Arbitrator could have properly utilized sources outside the agreement for guidance and context,* the dearth of such information in his opinion makes it difficult to contradict the unambiguous language of the agreement. It is axiomatic that if the Arbitrator undertook to, in effect, amend the contract, to substitute his own discretion for that of the parties or to dispense his own brand of industrial justice, the enforcement of the award must be denied."

Unlike *Timken,* Arbitrator Goldberg painstakingly considered the *context* in which the wage formula was modified during the 1967 negotiations. Arbitrator Goldberg's analysis is precisely the articulated rationale which the Sixth Circuit found to be missing in *Timken.*

The IUEC cites *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.,* 639 F.2d 386 (7th Cir. 1981), *cert. denied,* 454 U.S. 838 (1981) as an example of a case in which the Seventh Circuit refused to enforce an arbitrator's award. In *Milwaukee Typographical,* an arbitrator ordered an employer to negotiate over the "impact" of a new process, including negotiations as to "involuntary layoff, termination, bonuses and loss of overtime." *Milwaukee Typographical* at 393. It was not contended, nor did the arbitrator therein find, that the contract required bargaining on these subjects. Rather, the arbitrator therein simply included these additional items as subjects for bargaining in his award. But none of this is relevant to the instant case where Arbitrator Goldberg was asked to interpret a complicated

modification of a wage formula in a set of circumstances which the IUEC and NEII did not discuss at the time of the negotiations.

The IUEC relies upon *Detroit Coil Company v. International Association of Machinists and Aerospace Workers, Lodge 82,* 594 F.2d 575 (6th Cir. 1979), *cert. denied,* 444 U.S. 840 (1979), a case in which the Sixth Circuit overturned an arbitrator's award where the Court found that there was *"no evidence in the record"* which would allow the arbitrator to reach the conclusion that the parties *"to any extent* waived compliance with" the collective bargaining agreement therein. There is simply no similarity between *Detroit Coil* and the instant case because there is ample support for Arbitrator Goldberg's decision in the instant case.

In *Textile Workers Union No. 1386 v. American Thread Co.,* 291 F.2d 894 (4th Cir. 1961), the arbitrator therein "dispensed his own brand of industrial justice" contrary to the terms of the collective bargaining agreement. The arbitrator therein expressly found an employee to have committed actions which constituted just cause for discharge under the collective bargaining agreement but, contrary to this finding, the arbitrator nevertheless ordered the employer to reinstate the employee. From both a legal and factual viewpoint, this situation is far different from the instant case where Arbitrator Goldberg's opinion evaluates conflicting testimony and reaches a conclusion by interpreting ambiguous contract language through examination of the bargaining history which preceded the execution of the collective bargaining agreement. There is no inconsistency in Arbitrator Goldberg's opinion; Arbitrator Goldberg simply reviewed all of the evidence and interpreted the contract accordingly.

In *Clinchfield Coal Company v. District 28, United Mine Workers of America,* 720 F.2d 1365 (4th Cir. 1983) the collective bargaining agreement prohibited the licensing of coal mining "operations" which "resulted" in layoffs of the licensor's

employees. The arbitrator therein found that the licensing of coal "lands" violated the collective bargaining agreement even though it was clear that the licensing of the coal "lands" preceded the layoffs by many years and did not "result" in the layoffs. The Fourth Circuit vacated the arbitrator's award because (1) the arbitrator had ignored the clear distinction between coal "operations" and coal "lands" and (2) the arbitrator had not found any causal relationship between the licensing and the layoffs. It cannot be said that Arbitrator Goldberg ignored any relevant facts or provisions of the collective bargaining agreement. To the contrary, to the extent that the collective bargaining agreement is ambiguous, Arbitrator Goldberg examined the history of bargaining to ascertain the intent of the parties.

In *Pacific Motor Trucking Co. v. Automotive Machinists Union,* 702 F.2d 176 (9th Cir. 1983) the arbitrator therein refused to permit an employer to demote a working foreman even though the arbitrator recognized that the collective bargaining agreement expressly gave the employer discretion over the working foreman position. Again, unlike the instant case, the arbitrator in *Pacific Motor Trucking* "dispensed his own brand of industrial justice" contrary to the collective bargaining agreement.

CONCLUSION

For the foregoing reasons, the IUEC's petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 84-1788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS, AFL-CIO,

Petitioner,

v.

NATIONAL ELEVATOR INDUSTRY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

A. The employers respond that our argument on the language of the agreement is "purely semantic". Brief in Opposition at 16. We make no apology if our primary concern is with the language the parties themselves chose to include in their collective bargaining agreement. The process of interpreting and construing any contract "requires a determination of the meaning of the *language used*, not the ascertainment of some possible but unexpressed intent of the parties." *Joy v. St. Louis*, 138 U.S. 1, 34 L.2d 843 (1891) (emphasis added). In this case, the particular "language used" by the union and the employers in expressing agreement on mid-term changes in wage rates was "increase", not "decrease"; and that choice of words should be the most important determinative factor of this case.

At no point in the proceedings below or now in their brief to this Court have the employers ever satisfactorily explained why the term "decrease" was not included in the agreement along with "increase", if the parties really intended to permit downward adjustments in wages. True, the employers suggest that the possibility of decreases was "far from anyone's mind" during the critical 1967 negotiations because "at that time and for many years prior thereto every collective bargaining agreement in the building trades brought forth wage increases." Brief in Opposition at 16. But if the parties agreed upon a wage formula in 1967 without any thought to the matter of decreases, as the employers assert, how can the employers also argue that that formula now authorizes decreases? Can it really be said that the parties "mutually intended" something which, the employers tell us, was "far from anyone's mind" and which is the very opposite of the language used? The law of contracts does not in this manner burden a contracting party with risks never assumed. *See II Restatement of the Law of Contracts*, § 502.

B. The employers stress repeatedly that the change in the wage formula in 1967 was solely intended to account separately for increases in the fringe benefits of other trades; and that even after 1967, elevator constructor wages are still based upon the average wage rate of the other trades. *See* Brief in Opposition at 18. The union has never denied that the wage formula of Article V continues to involve "averaging" of the rates of other trades. However, it is undeniable that the "pure", simple averaging of other trades' rates that determined the elevator constructor rates prior to 1967 was replaced with a more complicated, multi-step process, which looked instead to the "average gross increase" obtained by the other trades to "be added to the existing wage rate of the Elevator Constructor Mechanic." *See* Petition at 4-5, fn. 3. If the employers wished the post-1967 agreement to provide for

the same possibility of decreases that was inherent in the "simple averaging" language of the pre-1967 agreement, they should never have consented to a new provision framed solely in terms of "increases" to be "added" to existing wage rates.

C. If the union really believed that it had won a wage provision that protected against decreases, the employers argue, surely the union would have publicized that fact to its members immediately after the 1967 negotiations. Brief in Opposition at 9, 16. If, however, as the employers have repeatedly stressed, the wage rates of the other trades were still increasing in 1967 and decreases were not then a likely possibility, there would have been no great incentive for the union to "crow" about the protection against decreases at that time. That could be saved for a future time when the protection was actually needed. The fact that a gain of less immediate significance (though, as things turned out, of great potential value) was not publicized at the time does not justify the inference that the gain was never achieved.

Moreover, we have never contended that preventing decreases was the union's sole objective in 1967 when the wage formula was changed; we have readily acknowledged that a desire to take advantage of the other trades' gains in fringe benefits was the prime motivation for the change in formula. *See* Petition at 21a. But in effecting that change, the union had the foresight to ensure that the new formula of the agreement was designed in a way that could not result in a wage decrease, should the economic climate prove more unfavorable in the future. The arbitrator should have enforced that agreement as written by the parties themselves in 1967, rather than rewriting its terms on the basis of a disputed reconstruction of bargaining history.

CONCLUSION

The arbitrator's decision does not draw its essence from the parties' agreement. Accordingly, the decisions below, enforcing the arbitrator's award, are in conflict with the decisions of this Court and other courts of appeals. In view of the role of arbitration in this country's labor relations, the question presented in this case is of sufficient importance to warrant this Court's attention. Accordingly, the writ of certiorari should be granted.

Respectfully submitted,

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